United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT M. DRYSDALE,
Attorney for Respondents,
1538 Dime Bank Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit, Mich.

INDEX

	Page
I. Concise statement of the case	1-6
1. Introductory	1
2. Factual data involved	2
3. Nature of controversy involved	3
4. Pertinent statutory provisions	4
5. Pertinent regulations involved	6
II. Summary of the Argument	7
III. Argument	10-39
1. Summary of statutory provisions	10
2. Summary of regulations	12
3. History of pertinent legislation	13
(a) Acts of March 2, 1799, March 3, 1873 and February 13, 1911	13
(b) Act of February 7, 1920 (new section 5)	14
(c) International Ry. Co. v. Davidson, 257 U. S. 506	15
(d) 1922 Tariff Act	16
(e) 1930 Tariff Act and 1938 Customs Administrative Act	17
4. Lawson, Ferguson and Mellon cases	17
5. Statements by Members of Congress and by Mr. Bond, not a member	19
6. Meaning of "overtime"	21
(a) and "remain on duty"	21
7. Customary working hour proviso	23
8. Liability of the Government	26

Page

9. Administrative construction 27
10. Complaints as to amounts involved..... 29
11. Comparison with other Labor Acts..... 30
12. Petitoner's claim of set-off..... 31
13. Special consideration of Ambassador Bridge and Detroit and Canada Tunnel.. 32
14. Reasons alleged for certiorari do not exist. Authorities on statutory construction 34
15. No public interest in matters involved... 36
    (a) Immigration Act 37
    (b) Other Government services alleged to be effected..... 38
    (c) Importance with respect to sums of money involved 38
16. In two decisions of the Court of Claims all of petitioner's contentions have been denied 39

IV. Conclusion 41

Appendix 42
1. Old and new Sections 5 shown together.. 42
2. Congressional record showing legislative history of customary working hour proviso 44
3. Congressional record showing purpose to increase pay of Customs employees..... 48

INDEX TO AUTHORITIES CITED

Cases:

	Page
Ferguson v. Port Huron and Sarnia Ferry Co., 13 Fed. (2d) 489	17, 21, 22
Geddes v. U. S., 38 C. Cls. 428	26, 32
International Railway Co. v. Davidson, 257 U. S. 506	14, 15, 22, 23
Interstate Railway Co. v. Mass., 207 U. S. 79	11
Koshland v. Helvering, 298 U. S. 441	28
Lake County v. Rollins, 130 U. S. 662, 670	35
Mellon v. Minn., St. Paul & S. S. M. Ry., 11 Fed. (2d) 332	17, 22
Myers v. U. S., 92 C. Cls. 447	39
Port Huron and Sarnia Ferry Co. v. Lawson, 292 Fed. 216	17
State v. Lancashire Fire Ins. Co., 66 Ark. 466, 51 S. W. 633	21
U. S. v. Beaver-Run Coal Co., 99 Fed. 2d 610	35
U. S. v. Dickson, 15 Peters, 141	25, 28
U. S. v. Trans-Missouri Freight Assoc., 166 U. S. 290	20

Statutes:

Act of March 2, 1799, Sections 50 and 53; 1 Stat. 665, 667	13
Act of March 3, 1873; 17 Stat. 579, R. S. 2871	13
Act of February 13, 1911, Sect. 5 (36 Stat. 901)	2, 4, 13, 42
Act of March 3, 1917; 39 Stat. 1106	26
Act of February 7, 1920 (41 Stat. 402; 19 U. S. C. A. 267)	4, 14, 42
Act of March 2, 1931; 46 Stat. 1467; 8 U. S. C. 109(a) (Immigration Act)	37

Page

Act of June 25, 1938; 52 Stat. 1082 (Customs Adm. Act of 1938) 17
Fair Labor Standards Act, 52 Stat. 1060; 29 U. S. C. 207 30
Revised Stat. 1790 (repealed 49 Stat. 864) 26
Tariff Act of 1922, administrative provisions—42 Stat. 948, 954 16
Tariff Act of 1930, Sections 40, 450 and 451 (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451) 2, 4, 17
U. S. C., Tit. 19, Sect. 6(a) (annual pay of customs employees) 31
Walsh-Healy Public Contracts Act, 49 Stat. 2036; 41 U. S. C. 35, 40 30

Miscellaneous:

Amer. Juris., Vol. 2, p. 12 (definition of agency) 33
Black's Law Dictionary (definition of bridge) ... 32
Brief for U. S. in Opposition, No. 1155, Oct. term, 1925 (Mellon case) 19
Comptroller Gen., Vol. 2, p. 512 (1923) 28
Congressional Record, Vol. 59, part 2, 66 Congress, Jan. 28, 1920, House of Rep. pp. 2172, 2173:
Customary working hour proviso 44
Intention to increase pay 48
Corpus Juris, Vol. 59, p. 952 35
Customs Regulations, 1937:
Art. 1242(a), 1245(a) 6
Art. 1242(e) 31
Art. 1462 (b), (c), (d) 7
Hearings, House Sub. Comm. of Ways and Means Comm. on H. R. 6577, 66th Cong., 1st Sess. 20, 37
Lewis Sutherland Stat. Const., 2nd ed., Vol. 2 .. 25, 34, 35

Page

Manual for Guidance of Outdoor Force of Customs Inspectors (1920) 15

Report of Comm. on Commerce, S. No. 306, 66th Congress, 1st Sess. 14

Report No. 1465, H. R. 8099, 75th Congr., 3rd Sess. 17

Sutherland Stat. Construction, 3rd ed., Vol. 2, p. 549 12

Treasury Dec. 38290 (Feb. 21, 1920) 13

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I.

CONCISE STATEMENT OF THE CASE

These suits were brought by customs inspectors at Detroit to collect extra compensation, as provided by the

administrative provisions of Sections 401, 450 and 451 of the 1930 Tariff Act (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451) for services in connection with unlading of merchandise and examination of passengers' baggage arriving from Canada. The services were performed on daily tours of duty of eight hours each when assignments to such tours of duty included night, Sunday and holiday services.

Such tours of duty are referred to as "regular tours." This description is hardly accurate. They were regular only in the sense they were for a normal eight hour period. A regular tour of duty more appropriately refers to a tour of duty during the regular daylight hours when the customs house is open.

Liability is based not only on Section 5 of Act of February 13, 1911 (36 Stat. 901), as amended, as suggested on page 2 of counsel's petition, but primarily on the administrative provisions of the Tariff Act of 1922, and which were re-enacted into the 1930 Tariff Act. Said Section 5 was incorporated into both Acts by reference.

Factual Data

The only factual matters in dispute are unimportant. They relate to administrative practices claimed by petitioner to have been adopted in the payment of extra compensation when services were performed on regular tours of duty at night or on Sundays or holidays. The practices as established at Detroit are clearly set forth in the special findings of fact, numbers 5 and 6, by the Court of Claims (R. 41, 42). The principle disagreement is whether extra compensation was paid for Sunday and holiday services because it was in excess of forty-eight hours per week, or whether it was because of the fact that the services were performed on Sundays or holidays.

Plaintiff's witness, Mr. Bushey, testified that at the car ferries where extra compensation was paid for Sunday and holiday services, that such payment was made whenever the work was performed on Sundays or holidays, without reference to the number of hours of service (R. 103, XQ. 73).

Petitioner has attempted to buttress its claims respecting the administrative practice, by including in its brief a copy of a letter written lately, on June 4th, last, by the Honorable W. R. Johnson, Commissioner of Customs. The writing of such letter is, of course, not the proper way to introduce evidence into this case and the letter is not competent for that purpose. In this connection, it is not claimed by petitioner that any official regulation or rulings were ever published requiring that extra compensation be paid only for work in addition to a given number of hours per week. The practice as claimed by Mr. Johnson to have existed is in conflict with the regulations issued by the Secretary of the Treasury (*infra* p. 6).

Nature of Controversy

The controversy in the Court of Claims centered principally upon the questions of, first, whether customs officers are entitled to such extra pay without having first worked forty-four or forty-eight hours per week (depending on whether before or after effective date of Saturday half holiday law), and, second, whether the United States became liable for such extra compensation.

The reasons alleged by petitioner for the granting of the writ are reduced to the simple issue of the contention that the decision of the Court of Claims is inconsistent with the language of the statute, its legislative history and long standing administrative interpretation (Petitioner's

brief p. 10). No claim is made of any conflict with decisions of other courts. The issues involved depend exclusively upon the construction of the pertinent statute. Application for Certiorari is in effect an application for a new trial.

Each and all of the contentions of petitioner advanced in its petition were rejected by the Court of Claims. Respondents contend that the decision of the Court of Claims conforms with the plain meaning of the language used in the Act, with the regulations issued thereunder by the Secretary of the Treasury, with its legislative history, and with the construction placed upon various phases of the Act by the Courts in the cases hereinafter discussed.

Pertinent Statutory Provisions

The pertinent provisions of the Tariff Act of 1930 (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451) and Section 5 of the Act of February 13, 1911, as amended by Act of February 7, 1920 (41 Stat. 402; 19 U. S. C. 267) and hereinafter referred to as the new Section 5, are as follows:

Section 401:

> (a) "The word 'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft."
>
> (b) "The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land; but does not include aircraft."
>
> (f) "The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."

(g) "The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian."

Section 450:

"No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, * * * shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the Collector * * *."

Section 451:

"Before any such special license to unlade shall be granted, the master, owner, or agent, * * * shall be required to give a bond * * * conditioned to indemnify the United States * * * and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5 * * *."

which Section 5 provides:

"That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime *(night, Sunday* or *holiday)* services by inspectors, * * * who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the unlading * * *. (For brevity the rates are omitted.) (Italics ours.)

The said extra compensation shall be paid by the master, owner, agent or consignee * * * whenever such special license or permit * * * shall be granted to the collector of customs, who shall pay

the same to the several customs officers and employees entitled thereto * * *. Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.

Provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Pertinent Customs Regulations

The pertinent provisions of the Customs Regulations promulgated in the 1923 Customs Regulations and carried forward into 1931 regulations and now appearing in Customs Regulations 1937, are as follows:

OVERTIME SERVICE

"Art. 1242. 'Extra compensation—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading * * *, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company.'"

"Art. 1245. Sundays and holidays—(a) for authorized services performed on Sundays and holidays between 8:00 A. M. and 5:00 P. M., customs officers and employees shall be entitled to two days pay in addition to their regular compensation."

Hours of Business and Service

Article 1461 Hours of Business—(a) This section specifies the hours during which the Customs House shall remain open for business. The hours specified are from 9:00 A.M. to 4:30 P.M. on all days except Sundays and national holidays, and Saturday afternoons, and which last provision was omitted from the prior regulations.

Article 1462 Official Hours of Service

(a) • • •

(b) "The official hours of the following employees will be: • • • inspectors to whatever duty assigned, • • •, from 8 A. M. to 5:00 P. M., 1 hour for lunch; • • •."

(c) "The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the Act of February 13, 1911, as amended by the Act of February 7, 1920."

(d) The Act of February 7, 1920, also provides (Here follows verbatim the customary working hour proviso so-called at the end of Section 5 *supra* 5.)

II.

SUMMARY OF THE ARGUMENT

Page

The Tariff Act clearly prohibits the appropriation of night, Sunday and holiday hours for the designated services without extra pay..... 10

The regulations conform with the statute.... 12

Legislative history of pertinent statutes from 1799 to 1938 reveals that the decision of the Court of Claims conforms with the legislative history and purposes of the Act..... 13

The principal purpose of the new section 5 was to increase pay of customs employees.. 14

Page

Definition of "overtime" stated in the Davidson case *(infra)*..... 15

Decision of the Court of Claims conforms to the Lawson, Ferguson and Mellon cases, and there are no conflicting decisions..... 17

The problems discussed with Mr. Bond, as cited by petitioner to have been made before various Congressional Committees, were disposed of by the plain language used by Congress. Statements made by him are not proper sources for aid in construction of this statute..... 19

MEANING OF OVERTIME:

Sunday and holiday work is universally accepted as "overtime"..... 21

"Remain on duty" means to remain on duty after reporting for duty..... 21

Decision of the Court of Claims conforms to the definition of overtime in the statute and the regulations and in the Davidson case *(infra)*.. 22

"Overtime" was first used in the new Section 5 instead of "night," in order to designate night, Sunday and holiday services..... 22

Respondent's construction conforms with the history of the statute and its purposes. Petitioner's construction tends to divert those purposes 22

The controlling provisions of the Tariff Act require extra compensation to be paid without reference to the word "overtime"..... 22

The working hour proviso at the end of Section 5 is for the purpose of conforming the custom house hours of a port to the prevailing working hours

Page

of employees in related industries. The express terms of the proviso prohibit the construction suggested by petitioner..... 23

The Government is responsible to the respondents for the extra pay provided by statute..... 26

The administrative construction of the Act, as claimed by petitioner to have existed, is not in conformity with the Act and should be struck down 27

Amount to be recovered by respondents is not excessive and is controlled by the statute..... 29

In practice, the extra pay of customs employees conforms generally with the amount of overtime provided in Fair Labor Standards Act and Walsh-Healy Public Contract Act..... 30

The set-off claimed by petitioner is prohibited by statute and is illegal..... 31

The Ambassador Bridge and Detroit and Canada Tunnel are means of transportation and as such come within the definition of "vehicle"..... 32

Also, the operators of those facilities are agents of their patrons for the purpose of supplying a means of transportation..... 33

Reasons for review as alleged by petitioner do not exist. Pertinent authorities on statutory construction 34

There is no public interest involved in this case. The Act is of limited applicability and only a small portion of a small group of Federal employes is involved 36

In each of two decisions on this case by the Court of Claims, each and all of the contentions of petitioner have been denied..... 39

III.

ARGUMENT

1.

SUMMARY OF STATUTORY PROVISIONS

The provisions of Sections 450 and 451 are clear and concise and easily understood. Certain services are described as being subject to extra compensation. They are the unlading of merchandise, baggage and passengers from any vessel or vehicle arriving from a foreign port or place. "Vehicle" is given a broad definition to include every description of carriage or other contrivance capable of being used as a means of transportation. Whenever such services are to be performed at night or on a Sunday or a holiday, a special permit is required and a bond must be filed conditioned to pay the extra compensation of the customs officers. For other services at night or on Sundays or holidays, no permit or bond is needed.

This language is used in connection with language in Section 5 reading as follows:

> "The said extra compensation shall be paid * * * whenever such license or permit * * * shall be granted * * *."

Those provisions are mandatory and no discretion is left in the collector. There is nothing there suggesting any construction as claimed by petitioner that the extra pay is to be conditioned upon the performance of 48 or 44 hours per week, or that it may not be paid for services performed on regular tours of duty at night, or on Sundays or holidays. In fact, the word "overtime" does not appear in those provisions.

Petitioner claims that it permitted all of the unlading involved in these suits to take place without a special permit or the filing of a bond, and urges that fact as one of its defenses.

Payment of extra compensation is to be made in accordance with the provisions of the new Section 5, which is Sec. 5 of the Act of 1911 (36 Stat. 901) as amended. The first four sections of the 1911 Act described the agencies of transportation to be affected by payment of extra compensation. They were described as "vessels or other conveyances" carrying cargo and arriving at a port. Those provisions were repealed in the 1922 Tariff Act and the agencies of transportation to be affected in the Tariff Act were redescribed in Sections 401 and 450 and given the broad definition heretofore noted. (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334 (*infra* p. 17).

The province of the new Section 5 is simply to fix the rate to be paid and to adopt the procedure necessary to accomplish the purpose specified in the Tariff Act. (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334), wherein the Court stated:

> "The reference to Section 5 contained in Section 451 relates merely to the manner in which the additional pay shall be computed, and by whom it shall be paid. It in no respect limits the scope of "vehicle" as used in the present Act to that of "conveyance" as used in the former Act."

The substantive rights of customs employees are created in the provisions of the Tariff Act, and the provisions of Section 5 are to be subordinated thereto and construed with reference to the language used in the Tariff Act. The applicable rule of construction, as stated by this Court in *Interstate Railway Co. v. Mass.*, 207 U. S. 79, at page 84, is as follows:

"If the document was identified, it would not matter what its own nature or affect might be, as the force given to it by reference and incorporation would be derived wholly from the charter."

When a statute is incorporated into a later statute by reference it is only the appropriate parts of the adopted statutes that are given effect. *Sutherland Stat. Construction,* 3d Ed., Vol. 2, p. 549. However, there is no conflict between the provisions of Section 5 and those of the Tariff Act. The rights conferred by Section 5 are restated with additional emphasis in the Tariff Act.

The provisions of the Tariff Act are broad enough to prohibit the appropriation of the night, Sunday and holiday hours of customs employees in connection with the designated services without payment of extra compensation. The rate of pay for those services is adopted from Section 5.

2.

SUMMARY OF REGULATIONS

It is in the foregoing quoted provisions of the Customs Regulations that the substantive rights of customs employees to extra pay is defined. There is nothing indefinite about those regulations. They represent the construction of the Secretary of the Treasury effective since the enactment of the Tariff Act of 1922 as to the conditions under which extra compensation shall be paid to customs officers. The word "overtime" is not used therein, nor is there any indication therein that extra pay is to be conditioned on prior hours of service. If such were deemed to be the fact, those regulations would certainly cover the point.

Insofar as the statute or regulations are concerned, there is no limitation to the number of hours per day or

the number of days per week which customs inspectors may be required to work. Their only protection is that they earn extra compensation when assigned to duty at night or on Sundays or a holiday.

A six day work week for customs employees has never been used as a basis for computing their daily rate of pay for the purposes of extra compensation. In accordance with T. D. 38290 (Feb. 21, 1920) their base annual pay is divided by 360. Thus, in these cases, the rate is computed by dividing $2100.00, base pay, by 360, resulting in the rate of $5.83, which rate has been used in computing the amounts herein claimed to be due.

3.

HISTORY OF PERTINENT LEGISLATION

(a) Acts of March 2, 1799, March 3, 1873 and February 13, 1911

By Sections 50 and 53 of the Act of March 2, 1799, (1 Stat. 665, 667) the unlading of cargo at night or on Sundays or the Fourth of July was prohibited except in cases or distress. Those provisions remained in force until 1873, during which period of time the importance of protecting customs officers in the enjoyment of their night, Sunday and holiday hours was paramount to the growing commerce of the United States.

By Act of March 3, 1873 (17 Stat. 579; R. S. 2871), provision was made for appropriating the services of customs officers at night for the purpose of unlading cargo from steamships arriving from foreign ports and provision was made for the payment of extra compensation for such services, and the collector was required to collect the extra compensation and distribute it to the customs employees entitled thereto.

From that time on, the pay of customs inspectors has consisted of two separate items, namely, their base pay and their extra compensation.

By Act of February 13, 1911 (36 Stat. 899), provision was first made for appropriation of the Sunday and holiday hours of customs employees for the unlading of cargo. The first four sections of the Act defined the agencies of transportation to be affected to be "vessels or other conveyances" arriving at a port. Section 5 fixed the rate of pay. It is this section, as amended in 1920, that was incorporated in the 1922 Tariff Act and later into the 1930 Tariff Act. From 1799 up to and including the passage of this Act, the word "overtime" had never been used in any legislation affecting extra compensation for night, Sunday or holiday services.

(b) Act of February 7, 1920 (41 Stat. 402; Tit. 19 U. S. C. (1940), Sec. 267)

On page 12 of petitioner's brief, the statement appears that this act was introduced at the request of the Customs Inspectors Association. This is erroneous. The bill, without the customary working hour proviso, with which it concludes, was introduced at the instance of the Treasury Department, with the approval of the United States Shipping Board and of the American Steamship Association. (Report of Committee on Commerce, Senate No. 306, 66th Cong., 1 Sess. Also, *International Railway v. Davidson*, 257 U. S. 506, pp. 512, 513.)

This Act is the new Section 5. Its congressional record clearly reveals that its principal purpose was to increase the pay of customs inspectors who admittedly were an underpaid group of Federal employees. See App. 48 showing quotations from Congressional Record. At that time customs officers received four, five and six dollars per day

for a ten-hour day (App. 50). These cases are based on $5.83 per day.

With a view of equitably distributing the increase in pay throughout the whole field force the Bureau of Customs in its "Manual for the Guidance of the Outdoor Force of the Customs Service, 1920," at page 19 of that Manual, issued the following regulations:

> "With a view to equalizing as far as practicable the extra compensation derived, assignments will be made to night work according to the rating order, exception only being made for reasons good to the assigning officers."

Also, the services for which extra compensation was to be paid were broadened to include services in connection with the unlading, receiving or examination of passengers' baggage.

In the new Section 5 appears the first use of the word "overtime" in all of this legislation. Extra compensation had been paid since 1873 without reference to that word. It was used in this Act in place of the word "night" when it became expedient to make provision for requiring the Secretary of the Treasury to fix a rate of pay for Sunday and holiday services, as well as night services. This was accomplished by deleting the word "night" and substituting the word "overtime" so as to include Sunday and holiday services as well as night services. This substitution is clearly reflected at App. 42, where the old and new Section 5 are shown together.

(c) International Railway Co. v. Davidson, 257 U. S. 506

Because of the inclusion in the new Section 5 of the provision for payment of extra compensation for services

in examination of passengers' baggage, the Secretary of the Treasury attempted to enforce the provisions of the Act at the International Bridge at Niagara Falls, and which action resulted in the case of *International Railway Company v. Davidson*, 257 U. S. 506. In that case this Court pointed out the distinction which had theretofore been maintained between the systems used in the examination of passengers' baggage and merchandise imported into the country, and also the fact that the provisions of the new Section 5 still related to the agencies of transportation described in the first four sections of the Act of 1911 and which were there described as "vessels or other conveyances" carrying cargo and arriving at a port, and held that the provision of the new Section 5 is given full effect when applied to passengers arriving on vessels, such as described in the first four sections of the Act.

(d) 1922 Tariff Act (42 Stat. 948, 954)

The opinion in the Davison case *(supra)* was handed down on January 30, 1922. The Tariff Act was approved on September 21, 1922. It was a general revision of the tariff laws which were considered to be entirely inadequate, (Rep. No. 248 on H. R. 7456, 67th Congress, 1st Session, 1922 Tariff Act, p. 1). The first four sections of the Act of 1911 were repealed, as well as all acts or parts of acts inconsistent therewith. More than 200 sections of the Revised Statutes were amended. By this Act Congress terminated the reasons assigned by this Court in the Davidson case why customs inspectors were not entitled to extra pay at the international bridge. *(Port Huron & Sarnia Ferry Co. v. Lawson*, 292 Fed. 216, p. 219; *Mellon v. Minn., St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, p 334).

(e) 71st and 75th Congress

In the 71st Congress (1930 Tariff Act) the House Ways and Means Committee reported that under existing law customs officers were entitled to extra compensation for night, Sunday and holiday services in connection with international ferries, bridges and tunnels where traffic was on a continuous twenty-four hour basis and recommended that such right be terminated. (Rep. No. 7 House of Representatives, 71st Congress, 1st Sess. to accompany H. R. 2667, p. 170). Congress did not pass the proposed amendment.

In the 75th Congress (1938 Customs Administrative Act, 52 Stat. 1082) unsuccessful efforts were made by the Treasury Department to terminate the right to collect extra compensation in connection with such traffic where customs employees were available on regular duty to perform the required services. (H. R. 8099, Rep. No. 1465, 75th Congress, 3d Sess. p. 14).

4.

LAWSON, FERGUSON AND MELLON CASES

Port Huron and Sarnia Ferry Co. v. Lawson, 292 Fed. 216.

Ferguson v. Port Huron and Sarnia Ferry Co., 13 Fed. (2d) 489.

Mellon v. Minn. St. Paul & S. S. M. Ry., 11 Fed. (2d) 332. Certiorari denied, 271 U. S. 678.

The above cases all involved construction of the extra compensation provisions of the 1922 Tariff Act.

In the Lawson case, Judge Tuttle, in the District Court for the Eastern District of Michigan, held that the Act

applied to the ferries at Port Huron, pointing out on p. 219 of the opinion, why the Davidson case was superseded by the administrative provisions of the 1922 Tariff Act.

The Ferguson case was unsuccessfully defended by the Ferry Company on the ground that extra compensation was not earned until regular hours of service had been first performed. The Government in that case took the opposite view as taken by petitioner in this case and claimed that the prior hours of service were not necessary in order to earn "overtime." The Court, on p. 492 of its opinion, pointed out that the statute gave its own definition of "overtime" and also cited the opinion of this Court in the Davidson case *(supra)*. On page 494, the Court held also that Sunday and holiday duty is in fact and in truth "overtime."

In the Mellon case, eleven great railway systems, whose services extended across the Canadian border from Maine to the Pacific coast, unsuccessfully sought to restrain the enforcement of the extra compensation provisions of the Act with respect to their railway trains crossing the international border. Much of the traffic involved was on a twenty-four hour basis and the revenue was protected by tours of duty. The Michigan Central Railway and Wabash Railway, operating three of the stations involved in this suit, were parties to that case.

On page 334 of the opinion, the Court pointed out the change made by the 1922 Tariff Act, which made the decision of this Court in the Davidson case inapplicable to the agencies of transportation described in that Act (*supra* p. 16).

On p. 15 of petitioner's brief, the Ferguson case is cited to the effect that the Court of Claims based its decision on the definition of "overtime" upon Judge Tuttle's definition in that case. This is erroneous. The Court of Claims

had little difficulty in basing its definition of "overtime" upon the provisions of the Act (R. 49, 50).

Also, on page 15 of petitioner's brief, appears the erroneous statement that the record in the Ferguson case discloses that the action was for the collection of services in addition to forty-eight hours per week. The pleadings in that case are concise and to the point and cover services at night and on Sundays and holidays, without reference to the forty-eight hours per week. The defense raised by the ferry company negatives such a statement.

The pleadings filed on behalf of the Secretary of the Treasury in the Mellon case and the statement of the questions involved in the brief filed in this Court in that case, in opposition to certiorari, clearly reflect the Treasury Department's interpretation of the Act. As stated in that brief, the action involved extra compensation for services at night, and on Sundays and holidays. There is no reference there to prior hours of service. Brief for United States, case No. 1155, Oct. term, 1925, p. 5).

5.

STATEMENTS MADE BY MEMBERS OF CONGRESS AND BY MR. BOND, NOT A MEMBER

Petitioner cites the debates on the floor of the House at the time of the passage of the new Section 5 (Petitioner's brief p. 12). It is conceded that the debates referred to were upon the subject of extra compensation for night services when in addition to regular tours of duty. However, the matter of overtime for working merely at night was not discussed. Also, the statements related only to night services and the matter of Sunday and holiday services was not even mentioned.

Petitioner also cites statements made at Committee Hearings in the 66th Congress (Act of 1920), 67th Congress (1922 Tariff Act) and 71st Congress (1930 Tariff Act). It is alleged that these statements reflected the intention of Congress with regard to the Act in question.

All such statements were made by Mr. Bond. It appears from such testimony that Mr. Bond was a customs inspector from Boston and that his organization had not held a meeting for a long time and that he had met a few of the inspectors from western ports but that the inspectors he represented were largely on the Atlantic Coast. (Hearings before the House Sub-Committee of the Committee on Ways and Means on H. R. 6577, 66th Congress, 1st Sess., p. 13.) His interest was in securing an increase in extra compensation for his constituents at the seaboard ports, and, apparently, he would not object to a discrimination by Congress against the inspectors at the Texas and Canadian borders.

Such statements are not appropriate sources of information from which to discover the meaning of the language of a statute. The reason is clearly stated in *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290, 318, from the opinion in which case, we quote:

> "There is, too, a general acquiescence in the doctrine that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.
>
> "• • • The reason is that it is impossible to determine with certainty what construction was put upon the Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other."

In *State v. Lancashire Fire Insurance Co.*, 66 Ark. 466, 472 (51 S. W. 633, 634), the doctrine is thus stated:

> "It is not at all true that those members who speak are the most influential, or that those who speak express the views of those who do not speak. * * *"

By attaching to the statements of Mr. Bond the importance suggested by counsel for the petitioner, is to give to Mr. Bond the right to create the supreme law of the land by making statements in Congress. Whatever problems were discussed by Mr. Bond, and others, before the Committees, were acted upon by Congress by enacting the new Section 5 and the administrative provisions of the 1922 and 1930 Tariff Acts, and it is to the plain language of those provisions to which we must needs look to determine just what Congress decided to do and did do regarding the problems discussed by Mr. Bond.

6.

MEANING OF "OVERTIME"

1. It must be admitted that if an employee works on a Sunday or a holiday, he is entitled to extra pay. Such always has been the universally accepted practice. In the pertinent legislation, Congress steadfastly protected that right for customs employees. Work on Sundays and holidays is in truth and in fact "overtime." (*Ferguson v. Port Huron and Sarnia Ferry Company*, 13 Fed. (2nd) 489, 494.) In this statute, "night" services are place on the same footing as Sunday and holiday services.

2. The phrase "remain on duty," as used in the new Section 5, was so used in connection with another new provision thereof for the purpose of correcting a prior practice of ordering customs inspectors to report for duty and then not paying them unless the unlading took place

(App. 49). The purpose of the amendment was to require payment of extra compensation when the employee had been ordered to report for duty and had remained on duty whether or not the work took place. It was so held in the *Ferguson* case *(supra)*.

3. Section 5 gives its own definition of "overtime" to be hours of service at night and on Sundays and holidays. It was so held in the *Davidson* and *Ferguson* cases *(supra)*. No further construction is permissible. The customs regulations issued by the Treasury Department *(supra)* adopt the same construction. No reference is made therein to prior hours of service. This construction was followed out in the *Mellon* case *(supra)*.

5. The word "overtime" was substituted for the word "night" in the new Section 5 when it became necessary to refer to Sunday and holiday services as well as night services, and, as used in the Act, means that night, Sunday and holiday services shall be compensated as overtime.

6. Respondents' construction conforms with the history of the Act and its purposes which were to facilitate lading and unlading at night and on Sundays and holidays and to increase the pay of customs employees by increasing their extra compensation for such services. Petitioner's construction would tend to defeat those purposes.

7. In the controlling provisions of the Tariff Act, payment of extra compensation is required to be made when the designated services are performed at night or on a Sunday or a holiday, and no reference is made to prior hours of service.

7.

CUSTOMARY WORKING HOUR PROVISO

The construction of the "working hour proviso" so-called, at the end of Section 5, as contended by petitioner, is specifically prohibited by the language of the proviso.

The proviso was added as an amendment to the proposed new Section 5 on the floor of the House in Committee of the Whole House at the time of the passage of the Act. In the appendix, pp. 44 to 48, we show from the Congressional Record, the history of this proviso, from which it conclusively appears that it was offered by Representative Dupre, of New Orleans, for the purpose of conforming the customs house hours of that port to the hours customarily worked by longshoremen, which were from 7 A.M. to 4 P.M., and whose services were necessary in unlading.

Inasmuch as the new Section 5 related only to the agencies of transportation described in the four sections of the Act of 1911, as pointed out by this Court in the *Davidson* case *(supra)*, it could not have been meant to relate to such continuous service as that at the international bridge at Niagara Falls.

Petitioner's contentions are predicated upon the theory that the regular working day of customs employees at Detroit is twenty-four hours, including Sundays and holidays. Such construction violates the definition given to the words "day" and "night" in Section 401 of the Tariff Act. When the new Section 5 was incorporated into the Tariff Act, the definition of "day" given in the Tariff Act would control the meaning of "day" as used in this proviso. It is specifically defined as the period from 8:00 A.M. to 5:00 P.M., and which is a period of nine hours.

In the Congressional Record *(supra)* it appears that Mr. Dupre purposely protected the extra compensation of customs employees from just such a construction as placed upon this proviso by the respondent, by placing a protecting clause therein. The protecting clause in this proviso is two-fold:

1st. One mandate of this protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter *the length of a working day* for customs employees. * * *" (Italics ours.)

2nd. The other mandate of the protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter * * * *the overtime pay herein fixed.*" (Italics ours.)

The length of a working day for customs employees, which cannot be "altered or affected" by the Collector, is fixed definitely in the enacting clause of Section 5 at nine hours, and might be referred to as the usual daytime hours. It is there referred to as the hours from 8:00 A.M. to 5 P.M. It is this nine hour period which cannot be affected or altered by the collector. He is vested with discretion to shift this nine hour period so as to conform with the customary hours of other employees of a port whose services are necessary in the unlading.

Likewise, the "overtime herein fixed" and which is not to be "altered or affected" by the collector is fixed in the enacting clause of the statute as extra compensation for services to be performed on Sundays and holidays and during a fifteen hour night period. There is no other "overtime" pay fixed in the statute.

Provisos limiting the effect of the general enacting clause should be strictly construed so that no case should

be taken out of the enacting clause which does not fall fairly within the terms of the proviso. (*Lewis Sutherland, Stat. Constr.*, Vol. 2, 2d ed., p. 674; *U. S. v. Dickson*, 15 Peters, 141, p. 165.)

By the collector's alleged right to regulate "hours," the collector at Detroit has made a vast number of regulations partially enumerated as follows and which are reflected in finding No. 6 (R. 42):

1. To differentiate between the vehicular ferries and car ferries, by relieving the one from the obligations of extra compensation, and requiring the other to pay.
2. To require payment of extra compensation at the passenger station of the Michigan Central Railroad, and to relieve the freight station of the same company from such payment.
3. To eliminate competition between vehicular ferries on the one side, and the Ambassador Bridge, Detroit & Canada Tunnel on the other side.
4. To eliminate competition between the freight service of Michigan Central Railway as against that of Grand Trunk Railway, Wabash Railway and Pere Marquette Railway.
5. To "alter and affect" the payment of extra compensation at any or all of the stations at Detroit involved in this suit.

It is perfectly obvious that no such vast powers were intended to be, or were given to the collector under that proviso.

8.

LIABILITY OF GOVERNMENT

It is claimed that the United States does not become liable unless an application is made for a permit and a bond filed. Such a construction not only violates the terms of the act, but it gives one officer of the Government the power to deprive another employee of the Government the pay provided by Congress, by simply neglecting or refusing to comply with the law. Such a result is illegal. *Geddes v. U. S.*, 38 C. Cls. 428, 442.

The customs inspectors are employees of the Government. Their pay is fixed by Act of Congress. There is no contractual relation between the inspectors and the transportation companies, importers or passengers. The inspectors must needs look only to their employers for pay. They have no right of action against anyone except the United States.

They have nothing whatever to do with the collection of the funds for which the transportation companies and others become liable. The collection of such funds is entirely out of their control. The Acts of Congress forbid a government official or employee from receiving pay for his services from a private source. (Act of March 3, 1917; Chapter 163, Sect. 1; 39 Stat. at L. 1106.) Customs officials were especially forbidden to receive such payment. (Rec. Stat. Sect. 1790; 49 Stat. 864.)

The Government has assumed the work of collection of these funds with which to pay extra compensation by requiring the collector to demand a bond from the agencies of transportation receiving the benefits of such services and to collect for such services when rendered by the customs officers and employees. There is nothing

in the statute in any manner making the right of the employee to his pay dependent upon collection of extra compensation from the carriers or others.

There is no doubt but that it was part of the plan that the agencies of transportation should pay for these services. All that was necessary to carry out the plan was for the agents of the Government to enforce the provisions of the Act. But no less a part of it, and in fact the most important purpose of this legislation, was to facilitate lading and unlading at night and on Sundays and holidays and to provide extra compensation for the customs employees to stimulate their interest in those services.

From a practical standpoint, this problem of who should pay for these services was solved by Congress in the only legal manner possible. The only manner by which the plan could be carried out legally was for the Government to assume the obligations of payment to customs employees, and to reimburse itself from the agencies of transportation involved, and this is just exactly what it did accomplish.

Payment necessarily had to be made by the Government through the Collector, and the extra compensation to the inspectors had to come out of the funds of the Government and the Government became liable for the extra compensation. The failure by the Government to collect from the agencies of transportation did not relieve it from the liability for the payment of the extra compensation.

9.

ADMINISTRATIVE CONSTRUCTION

Petitioner lays great stress upon the construction alleged to have been given the Act by the Collector of Customs, notwithstanding no opinion or regulation in accord-

ance with the alleged practices was ever officially promulgated. Respondents contend that the practices relied upon were out of harmony with the statute and not in accordance with the regulations officially issued by the Secretary of the Treasury.

But had any regulation been issued authorizing such practices, the regulations would be a nullity. The doctrine is well established that any rule or regulation of an administrative body out of harmony with the statute upon which it is based, is a nullity.

Any uniform construction of the pertinent act by the Bureau of Customs is entitled to great respect, but that doctrine has its limitations. If such construction is not in conformity with the provisions of the law it should be struck down. The case at bar is controlled by the cases of—

U. S. v. Dixon, 15 Peters, U. S. 141, 161 and
Koshland v. Helvering, 298 U. S. 441, 446, 447.

In the Dixon case the uniform construction of an Act of Congress made by the Treasury Department over a period of years from 1818 to 1834, was struck down as not in conformity with the act upon which it was based.

In the Koshland case a regulation issued by the Treasury Department under the 1921 Revenue Act, although of long standing and universally acted upon, was struck down because the regulation was not justified under the statute.

In Note 13 on page 15 of petitioner's brief, 2 Comp. Gen. 512 (1923) is cited in support of the allegation of the alleged administrative construction of the Act presumably on the theory that in the case so cited extra compensation was denied on the ground that prior hours had not been worked by the inspector. That decision has no

reference whatsoever to overtime. The services there involved were for guard duty to prevent landing of liquor from a boat in port for the purpose of coaling. Extra compensation is not earned by guard duty, regardless of the time involved.

If, as it seems possible, the decision in that case was used as a precedent by the Collector of Customs in his refusal to pay overtime for services, such as herein involved, then it becomes easy to see why such an unlawful practice may have put into effect.

10.

COMPLAINTS AS TO AMOUNTS INVOLVED

Petitioner complains that the amounts to be recovered by respondents are excessive. A complete answer to that argument is the fact that the rates of pay were fixed by Congress. Because of the unlawful administration of the Act by the collector, it is probable that some customs officers have been deprived of the increase in their pay which Congress provided, while others have received more than contemplated. This inequity results from the assignment of more night, Sunday and holiday services to certain inspectors than to others.

However, that is not a matter for the Courts. If the Bureau of Customs considers the Act to be inequitable, then its remedy is by redress in Congress and not by way of attempting to change the plain meaning of the act by practices out of harmony therewith.

Most of the customs services are performed during the usual daylight period of eight hours on week days although during certain seasons the traffic becomes heavy at some international bridges on Sundays and holidays. The num-

ber of tours of duty performed during the regular weekly daylight hours far exceeds the number of hours performed at night and on Sundays and holidays.

By spreading the assignments of tours of duty at night and on Sundays and holidays in an equitable manner throughout the whole force, a reasonable raise in pay for all inspectors would result.

11.

COMPARISON WITH OTHER LABOR ACTS

In Note 16, page 17 of petitioner's brief, reference is made to the Fair Labor Standards Act and Walsh-Healey Public Contract Act under which one and one-half times the base pay is fixed for overtime, and with the inference that the rate fixed by Congress in the pertinent statute is unreasonable. A comparison however of the results accomplished by those two acts, with the rates fixed in the Customs Act, reveal that were respondents working under the provisions of either of those acts they would have received slightly more for working at time and one-half on Sunday than is provided for customs officers in the pertinent act.

Those Acts are based upon a forty-hour week and under them respondents' daily rate of pay would then be computed by multiplying 52 by 5 (representing 5 days per week), giving 260, and dividing the base pay of $2100.00 by 260, giving a daily rate of $8.08. 1½ times $8.08 equals $12.12 extra pay, which would be paid customs officers under either of those two acts, for working on Sunday.

Customs officer's base pay in these cases is computed by dividing $2100.00 by 360 giving a daily rate of $5.83. By working eight hours on Sunday or at night, they become under the pertinent statute entitled to two days additional pay, or $11.66.

12.

PETITIONER'S CLAIM OF SET-OFF

It is clear that this extra compensation is in addition to the regular pay of these officers. The base pay of plaintiffs is fixed by Statute from which we quote:

> "The following annual rates of compensation are hereby established for the employees in the customs service hereinafter specified:
>
> (e) Inspectors, $2100 * * *."
>
> (U. S. C. A. title 19, Sec. 6 (a)—Act December 12, 1930, C. 10, 36 Stat. 1026.)

Under Section 5 it is specifically stated that the extra compensation shall be "additional pay."

Article 1242 (e) of Customs Regulations of 1937—provides for extra compensation as follows:

> "The extra compensation for overtime services *is in addition to the regular compensation paid by the government* in the case of officers and employees whose compensation is fixed on the ordinary *per diem* basis and those receiving a compensation per month or per annum." (Italics ours.)

Respondents earned their base pay by serving the tours of duty assigned to them. If their tours of duty happened to be at night, or on a Sunday or a holiday, they became entitled also to extra compensation fixed by the statute and customs regulations.

If the collector had the authority to "dock" them for usual hours not worked by them, then their superiors could prevent them from earning any salary at all, or could reduce the amount of their salary provided by statute, by adopting the expedient of not assigning them to duty.

Neither the collector nor any of the superior officers of these men have any authority whatsoever to reduce or interfere in any manner with the base pay of these men as provided by statute, just so long as they serve when and where directed. *Geddes v. U. S.*, 38 C. Cls. 428, 442.

13.

SPECIAL CONSIDERATION OF THE AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

Counsel for petitioner suggest that the Davidson case *(supra)* still applies to traffic over the Ambassador Bridge and the Detroit and Canada Tunnel notwithstanding the broad definition given to "vehicle" in the Tariff Act and the mandatory provisions of Sections 450 and 451.

Plaintiffs contend that both the tunnel and the bridge come within the definition of vehicle as defined in the act and that each is a "carriage or other contrivance used, or capable of being used, as a means of transportation on land" and as such the owners or agents of those facilities are required to file a bond as required by Section 451 of the act.

Black's Law Dictionary gives the common definition of a bridge to be "a structure erected over a stream * * * to facilitate the passage thereof." In Volume 4 of R. C. L. at page 193, the following definition appears, "A bridge has been defined to be a structure * * * erected over a river * * * for the more convenient passage of persons and beasts and *for the transportation of baggage.*" (Italics ours.)

It is a means of passing from one bank to the other and so becomes a contrivance used as a means of transportation. It is a means used in transporting traffic from

one bank to the other. Likewise, the tunnel in this case is a means used for transporting traffic under the stream.

There is no difference between a ferry, a bridge or a tunnel as a means of conveyance of persons, baggage or freight from one side of the river to the other. All accomplish the same purpose. Protection of the revenue at the bridge and tunnel was just as necessary as at the ferries.

Furthermore, the bond is required from the "master owner or *agent*" (italics ours) of such vessel or vehicle. When the operators of such bridges and tunnels accept fares from patrons for the use of their facilities, they became agents of such patrons for the purpose of furnishing a means of safe transportation to the opposite short. They become more than mere licensees. The bridge company assumes an obligation for furnishing a means of safe passage. That liability continues until the patron leaves the bridge.

> "An agency may be defined as a contract either express or implied * * * by which one of the parties confides to the other the management of some business to be transacted * * * on his account * * *." (*2 Amer. Juris.*, Sect. 1, p. 12.)

The relationship is one of principal and agent to the same extent as in the case of the railway company and its passengers. This interpretation conforms to the meaning attached to the word "agent" by Customs Regulations which provide that the "transportation company" file the bond. (Article 1242(a)-1937, *supra* p. 6.) There can be no question but that the bridge company and tunnel company, respectively, are transportation companies within the meaning of that regulation.

14.

REASONS ALLEGED BY PETITIONER FOR THE GRANTING OF THE WRIT—AUTHORITIES ON STATUTORY CONSTRUCTION

The reasons alleged by petitioner for the granting of the writ are not well founded because the decision of the Court of Claims conforms to the language, purpose and legislative history of the Act. The language of the statute is clear, concise and easily understood. There is no ambiguity in the wording of the statute. It construes itself, leaving no occasion to resort to extrinsic aids for its construction. There is no other result that could have been reasonably reached by the Court of Claims.

The construction of this statute falls within the doctrine expressed in the following authorities:

Lewis Satherland Statutory Construction, 2d Edition, Section 367, p. 702.

> "'When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction.'
>
> "It is not allowable to interpret what has no need of interpretation."
>
> "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. These views of eminent courts are supported by numerous cases. When the meaning of a statute is clear, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the legislature and not by judicial construction."

And again in the same volume in Section 348, p. 665, the same principle is expressed as follows:

> "The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction."
>
> "Where the words * * * admit of two interpretations * * * the construction ought to be favorable to the claims of the officer who performs the duties * * *" *(United States v. Morse,* 3 Story 87).

To the same effect, see

59 Corpus Juris, 952;
Lake County v. Rollins, 130 U. S. 662, 670.

In the latter case, it is said:

> "to get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

United States v. Beaver Run Coal Company, 99 Fed. 2d 610, 613.

> "It is a well established doctrine that a clear, unambiguous statute must be literally construed. *Hamilton v. Rathbone,* 175 U. S. 414, 20 S. Ct. 155, 44 L. Ed. 219; *Thompson v. United States,* 246

U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; *Crooks v. Harrelson*, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156, *Helvering v. New York Trust Company*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361. * * *"

Certainly there is nothing extraordinary in following the universal custom of requiring extra compensation to be paid for services on Sundays and holidays nor in placing night services in the same category. Especially is this true when the history of the statute under consideration clearly shows a fixed determination over a period of one hundred and twenty-one years to protect the employee in his right to night, Sunday and holiday time.

A construction of the Act as contended by petitioner necessitates reading something into the Act not expressed therein. To uphold its contentions would constitute an exercise of judicial legislation which the courts have neither the right nor the power to indulge, and would require a holding that although Congress had employed plain, positive and easily understood language to express its intention, it had in reality intended something different which it did not express.

15.

NO PUBLIC INTEREST IN MATTERS INVOLVED

Respondents deny the public importance alleged by petitioner to exist with respect to the matters involved. The statute relates only to a small body of government employees. It is not a statute of general applicability. Furthermore, the points in dispute relate only to a small percentage of this small group. It is only those employees working on tours of duty at night or on Sundays or holidays that are involved, and all of those employees are located at contiguous border ports as distinguished from

seaboard and interior ports. They comprise only a small part of the total number of customs employees.

The Mr. Bond cited by petitioner, in "Hearings before a sub-committee on Ways and Means, House of Representatives, H. R. 6577, in the 66th Congress, on page 14, estimated that the number of customs inspectors in the United States to be about 1,000, and that 700 of that number were in naval and other seaboard ports. According to that estimate, about 300 customs inspectors were employed at ports other than the seaboard ports. Of that number, some are assigned to interior ports and are not affected. A liberal estimate, after making allowance for any increase in the force since Mr. Bond testified, would be three hundred customs employees to be affected by these suits.

(a) Immigration Act

Petitioner cites the similarity of the Immigration Act (Act of March 2, 1931, c. 368, 46 Stat. 1467 (8 U. S. C. 109(a)) to Section 5 of the statute here involved as a reason why review should be granted. But it is not clear that a decision in this case would be authoritative on the construction of the Immigration Act.

Furthermore, even if the decision here would be controlling in the Immigration Act, there still would be no matter of general public interest involved. Immigration inspectors and customs inspectors are substantially equal in number and only those immigration inspectors would be affected who are assigned to tours of duty at night and on Sundays and holidays at the contiguous border ports. The number of employees to be affected would be substantially the same as the number involved in this litigation.

(b) Other Government Services Alleged to be Affected

The shipping commissioners and their deputies alleged to be affected would in no way be involved by a decision in this case for the reason that their duties do not require assignments to tours of duty outside of the regular daytime working hours. With respect to them, there is no traffic involved as with customs inspectors requiring continuous service.

The same situation exists with respect to inspectors of the engineering department of Federal Communications Commission. The nature of the duties performed by such inspectors do not require assignments to duty at night, or on Sundays or holidays, such as are required of customs officers.

The lack of the public importance involved in the two last named acts is illustrated by the small number of overtime hours involved with respect to the services of radio inspectors. With respect to them, the number of overtime hours of service involved for a period of six months from July 1, 1939, to December 31, 1939, was 633 hours (Report No. 2831, House of Representatives, 76th Congress, 3d Sess. on H. R. 10205) on the subject of overtime compensation for radio inspectors.

(c) Alleged Importance With Respect to Sums of Money Involved

Counsel for petitioner have cited the figure of $8,000,000.00 to be involved in customs officers litigation. There is no substantiation of this estimate. Most of the claims that will be presented are already in suit. An estimation of $2,000,000.00 to $2,500,000.00 is ample to cover the total claims already filed and to be presented.

In this connection, it is pertinent to suggest to the Court that in accordance with the decision of the Court of Claims, the Bureau of Customs has been violating the overtime provisions of the Act for over twenty years. In 1920 Customs officers pay was $4.00, $5.00 and $6.00 per day (*supra* 50). The pay in these cases is computed on the basis of $5.83 per day.

These employees have been obliged to await the strength of united action in order to bring suit against their employer for what is their lawful due. The larger the amount that has been kept from them in violation of the Acts of Congress, the more necessary it should be that this compensation be paid to them as quickly as possible. The redress should be swift and certain.

In view of these circumstances, we respectfully suggest that the Court should not be industrious in continuing this litigation and thereby increasing the heavy burden already assumed by these employees and which they can ill afford.

16.

THOROUGH CONSIDERATION GIVEN BY COURT OF CLAIMS

It appears that these cases were twice argued before the Court of Claims (R. 1): That as a result of the first argument, the court filed findings of fact and conclusions of law on January 6, 1941, holding plaintiffs entitled to recover and that entry of judgment was suspended to await the filing of a stipulation of the amounts due or the taking of proofs thereof, with opinion by Chief Justice Whaley (92 Ct. Cls. 447), and that the usual motion for a new trial was made and denied.

That on October 6, 1941, a motion for entry of judgment for the plaintiffs was argued and submitted by counsel for

petitioner, and opposed by the United States, and that on October 17, 1941, the Court on its own motion filed an order withdrawing the former findings, conclusions of law and opinion and remanded the cases for further argument *ab initio*.

Although the reasons for this are not clearly apparent from the record, the facts in connection therewith are of such a nature that we deem this Court may take notice thereof.

Judge Whitaker has disqualified himself from participation in these cases, he having filed the first brief in the Court of Claims in this case on behalf of the United States before his elevation to the Bench. At the first hearing, three Judges only participated—Judge Williams at that time being sick. The first opinion filed was the unanimous opinion of the three Judges participating.

By the time motion for entry of judgments based on the first opinion came on for argument, one of the three judges so participating had retired and Judge Williams had died, and only two Judges were then sitting who had participated in the first argument. We believe that the order setting aside the first opinion and findings of fact and conclusions of law was entered because of the laudable desire of the Court to permit the new Judges to participate and to safeguard against possibility of error.

It appears, therefore, that this case has been twice argued before the Court of Claims and has received the utmost consideration and that every Judge participating, except Judge Madden, has concurred in the opinion of the Court and that Judge Madden has concurred in such opinion in all matters except as to the application of the extra compensation provisions of the Act to the facilities of the Ambassador Bridge and Detroit and Canada Tunnel.

IV.

CONCLUSION

Respondents respectfully submit that a Writ of *Certiorari* should be denied in this case because:

(1) There is no merit to petitioner's several contentions and in a well considered opinion, the Court of Claims has decided correctly issues of no general applicability; and affecting only a limited number of a small group of federal employees.

(2) Because the pertinent statute has been construed correctly by the Court of Claims and petitioner has failed to show any probability of error in the decision of that court.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

August, 1943.

APPENDIX

OLD AND NEW SECTION 5 SHOWN TOGETHER

The phrases omitted from old Section 5 are bracketed and are in small capitals. The new phrases are in *italics*. That part of the section which remained is in ordinary type.

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [NIGHT] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock post-meridian and eight o'clock ante-meridian, or on Sundays or holidays, to perform services* in connection with with the lading or unlading of cargo [AT NIGHT], or the lading [AT NIGHT] of cargo or merchandise for transportation in bond or for exportation in bond or for [THE] exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage* [BUT SUCH RATE OF COMPENSATION SHALL NOT EXCEED AN AMOUNT EQUAL TO DOUBLE THE RATE OF COMPENSATION ALLOWED TO EACH SUCH OFFICER OR EMPLOYEE FOR LIKE SERVICES RENDERED BY DAY], *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty.* [,] The said extra compensation *shall* [TO] be paid by the master, owner, agent, or consignee of such vessel or other

conveyance wherever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent or consignee of such vessel[s]: *Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.*"

REGARDING CUSTOMARY WORKING HOURS

Congressional Record, Vol. 59, Part 2,
66th Congress, Jan. 28, 1920

(Proceedings House of Representatives)

(Pages 2172 and 2173)

"Mr. Dupre: Mr. Chairman, I intend to offer the following amendment, and I might as well discuss it now. I will ask the Clerk to read the amendment.

The Clerk read as follows:

> 'Amendment offered by Mr. Dupre: Page 3, line 10, strike out the quotation marks, insert a colon and the following:
>
> Provided further, That in those ports where customary working hours are other than those hereinabove mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Dupre: * * * The amendment is offered simply to meet the situation that exists in my home city of New Orleans and possibly in other ports of the country. The bill as drawn provides for overtime pay between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, proceeding on the theory that working hours begin in all ports at 8 o'clock in the morning and end at 5, with an hour for lunch. It happens that in the city of New Orleans conditions are different, as was set forth in a telegram received by me from the agent of the New Orleans Steam-

ship Association, which will explain exactly what the situation is there. I will ask the Clerk to read the telegram.

The Chairman: Without objection, the Clerk will read the telegram in the time of the gentleman.

The Clerk read as follows:

New Orleans, La., January 27, 1920.

Hon. H. Garland Dupre,
House of Representatives,
Washington, D. C.:

We understand that Senate bill 3418 passed the Senate December 16, has been reported favorably, and this bill fixes rate of overtime compensation and hours in reference to customhouse officers and employees, etc. The regular day hours of longshoremen at New Orleans are from 7 in the morning to 4 in the afternoon, with meal hour from 12 to 1, while the bill in question provides hours of customs employees from 8 in the morning to 5 in the afternoon, so that there will result much confusion and unnecessary expense. Therefore the New Orleans Steamship Association request that you will use your influence toward having inserted in this bill a clause providing that in those ports or in those industries where the customary hours are from 7 in the morning to 4 in the afternoon authority be vested in the collector of customs to regulate the hours of customs employees to agree with prevailing customary hours in those ports or industries. We would appreciate your giving this matter your earnest attention.

S. T. Demilt.

Mr. Dupre: In accordance with that request and in accordance with the condition that exists in New Orleans, I have offered the amendment, which is entirely permis-

sive. It leaves with the collector of customs the authority to regulate the hours of customs employees so as to agree with the prevailing working hours in those ports; but I have safeguarded the eight-hour day which this bill provides for, and I have safeguarded the provision for overtime by adding the words—

> But nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

I have submitted that amendment to the two majority members of the subcommittee of the Ways and Means Committee who considered the bill, the gentleman from Massachusetts (Mr. Treadway) and the gentleman from Connecticut (Mr. Tilson), and they think the amendment is entirely unobjectionable, saying that the conditions referred to had not been drawn to the attention of the committee.

Gentlemen here will realize what would happen if longshoremen, who have a way of their own about many things, decided to go to work at 7 o'clock and work until 4, and under the law the customhouse employees, who should work concomitantly with the longshoremen, could not get any overtime pay until between the hours of 5 P.M. and 8 the next morning. There would be a hiatus between 4 o'clock when the longshoremen stopped work and 5 o'clock when the customhouse employees would begin to get their overtime, naturally the later would not want to work in the interim. The result would be very unfortunate, and this merely allows the collector of customs to say that those two bodies of men, both of whom are essential to unloading and loading the ship, may be allowed to work at the same time. It is not mandatory in any way, but merely discretionary with the collector.

A similar telegram has been received by my colleague Mr. O'Connor, of Louisiana, who is here in the chamber, and who shares with me the views expressed by me both as to this bill and to the amendment proposed."

* * * * *

(Pages 2177 and 2178)

"Mr. Dupre: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

* * * * *

Mr. Dupre: * * * The bill in question, in providing for overtime pay, fixes the same between 5 o'clock p. m. and 8 o'clock a. m. It happens that in the city of New Orleans the working hours of the longshoremen are from 7 a. m. to 4 p. m., and in order that there shall be no conflict between this bill and the working hours of the laboring men of that city, and possibly in other ports, this proviso simply authorizes the collector of customs to adjust the hours of the customhouse employees with those of the prevailing working hours in that city. In other words, if the men begin their work at 7 o'clock and work until 4, the collector of customs can provide that the overtime shall be from 4 p. m. until 7 the next morning instead of from 5 p. m. until 8 o'clock the next morning. It is entirely permissive. If the collector of customs sees any reason why it should not be done, it is within his authority not to do it, and I have safeguarded absolutely any possibility of lengthening the working day to more than eight hours provided by the bill or interfering with the overtime charge in any way.

Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the customhouse hours at that port.

Mr. Dupre: Entirely; and at other ports, for aught I know. I trust the gentleman from Ohio has enjoyed my explanation of the matter."

REGARDING INTENTION TO INCREASE PAY OF CUSTOMS EMPLOYEES

(Congressional Record coninued)

(Page 2171)

"Lading or unlading of vessels at night.

Mr. Treadway: Mr. Speaker, by direction of the Committee on Ways and Means I call up the bill S.3418.

The Speaker: The gentleman from Massachusetts, by direction of the Committee on Ways and Means, calls up a bill, which the Clerk will report.

The Clerk read as follows:

> 'An Act (S. 3418) to amend an act entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes, approved February 13, 1911."'

* * * * *

"Mr. Treadway: Mr. Chairman, the bill before the committee, S.3418, has to do with the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes. It is an amendment of the original act of February 13, 1911. * * * Therefore this amendment will reduce the hours of labor from 10 to 8. It also puts into effect as law the method of payment for overtime, rather than having the payment for overtime regulated by customs regulations. It establishes as law, in other words, the system for payment of overtime. It also permits all men

who are ordered to report for lading or unlading of vessels to be paid, when ordered to report, for overtime. It seems that through a regulation of the customs department if these inspectors have been ordered to appear for work and for any reason a vessel was not there for them to go to work on they did not receive pay for that time. That seems entirely unfair. It is not the fault of the inspectors that the vessels are not there. It is not a fault of theirs that they are not working rather than waiting to work. Therefore there is this further provision whereby payment will be made to the men if ordered to report for overtime work.

• • • I might add that phrases appear in the bill showing that this payment is made by the steamship company reimbursing the Government for the amount paid. *The pay of these inspectors has been very low. The rates of pay are $4, $5 and $6 per day for a 10 hour day.* I think the members of the committee will agree with me that while we retain that same rate of pay we ought to be willing to pay these men for overtime on a basis of an 8 hour day rather than on the basis of a 10 hour day."

• • • • •

Mr. Husted: I understood that the customs inspectors were very much underpaid.

Mr. Treadway: I think there is no question about that.

Mr. Husted: I would like to ask the gentleman if he thinks there would be sufficient overtime work to give these men adequate compensation under the provision for overtime in this bill?

Mr. Treadway: I will state to the gentleman that the department, as I am informed, is taking up the rescheduling of all customs employees, and pending that official report to the Secretary of the Treasury, or whoever may be making the investigation, this method is

agreeable both to the department and to the men; and I might add, there is sure to be much more overtime on the basis of 8 hours than if the men were working 10 hours.

Mr. Husted: There is, then, a reasonable prospect that by some future legislation the compensation of these men will be increased?'''

* * * * * *

(Page 2172)

"There has been submitted to a Member of the other branch, who was particularly interested in this bill, an opinion from the collector of the port of New York, where of course the larger number of these men are employed. I wish to read, Mr. Chairman, just a short extract from that letter. I read:

> 'On behalf of the underpaid customs employees of this port I want to express grateful appreciation of your successful efforts in putting through the Senate bill 3418, which provides, among other things, for compensation for the customs inspectors employed on baggage duty for their services at night and on holidays. This will place them on an equal footing with inspectors who are employed on cargo and who now receive from the steamship companies compensation for night work.'

Then the collector goes on to say that fundamentally he does not believe in the Government being reimbursed for Government work by steamship companies, but that has not directly to do with this case. He says further:

> 'I am sure if you knew as definitely as I know the distressing conditions among the Government's employees in this port, you would realize more

fully perhaps why we are grateful to you for this effort in our behalf. When you realize that with the exception of a bonus of $240 per annum to all Federal employees receiving up to and including $2,500, these men are getting practically the same scale of wages given them a quarter of a century ago, you will understand, I am sure, why I have profound admiration for their patience and their patriotism in sticking to their jobs.

As a matter of fact, we are rapidly losing our most efficient men. Resignations are coming to me daily, and the force is now materially reduced beyond where it was prior to the war. The merchants' association and other civic organizations in New York have interested themselves in the situation, and will soon make an appeal to Congress to take some steps in the direction of safeguarding the interests of importers and exporters in this port by way of strengthening the customs machinery here.

At all angles our Federal employees see a most prodigal display of unprecedented wealth. Meanwhile they are harassed with the consciousness that in many instances at home their children are suffering for the want of proper food and clothing. They know that ours is the richest Government in the history of the world, and they are wondering why then, the servants of this most wealthy Government, must go on in poverty."

The letter is signed by Byron H. Newton, collector. I think that is very strong evidence in behalf of the legislation called for by this bill from a man of experience in the very line of coming in contact with these men who are working for a very meagre stipend, needing to be men of good appearance, gentlemen in their conduct toward the passengers with whom they come in contact, and recognizing that the service must become impaired unless a means can be found, as is furnished by this bill, to increase the pay of the men."

(Page 2173)

"Mr. Benson: Mr. Chairman, the purport of the bill has been called to my attention by a number of men working in Baltimore. I happen to be familiar with the work these men are doing, and this bill meets a much needed reform. At one time these men were allowed to collect extra pay from the shipper, but now under some regulation that is prevented.

They are really the most underpaid for men of their ability and fidelity of men in the Government service."

* * * * *

"Mr. McCrate: Mr. Chairman, in New York City we have a great many of these men employed in the Customs Service, and during the war an attempt was made to get them to leave the service. You can understand that men familiar with the shipping business during the war could receive much larger remuneration outside of the service than inside; and yet, notwithstanding the temptation, the greater portion of the customs employees and inspectors stayed and maintained their relationship with the Government.

I know many men, working there nights and Sundays and then having to report early Monday morning, stayed there and performed their duties notwithstanding these tempting offers from outside.

Yesterday something was said by a gentleman in the House that it seemed strange, in view of the complaints as to the low salaries of employees, that they should want to hang on to the Federal pay roll. As a matter of fact, I always give advice to young men and women who seek service on the Federal pay roll not to do it. The

best thing they can do is to seek employment outside; but once they get attached to the Federal service it then becomes a question, after leaving that service, where they will get similar employment. I believe the Federal Government is not helped by suggestions that young men and women should leave its service, but we should attempt to give them adequate compensation for the services they render to the Government.

In our own city of New York I know that the letter carriers and postal clerks and other Government employees are receiving much less than the wages paid to unskilled labor. The temptation for men and women in Federal employ to quit the service is much greater than most people realize, and I am certain that Members of Congress do not desire to encourage them to do that, but desire rather to hold efficient employees by adequate compensation. (Applause.)"

(Page 2175)

"Mr. Briggs: Mr. Chairman and gentlemen of the committee, I am very much in favor of the bill pending before the committee. It seems to me that the Government has been waiting rather a long time to grant some relief to these men who have been so patient and faithful for so long without such relief. A great number of these customs employees and other employees covered by this bill are employed along the dock fronts in the customs service in the great ports throughout this country, and many of them at the ports in my district—the ports of Galveston and of Texas City. Those men work at all times and in all weathers, and they do not complain. They can not stand the burden and pressing costs of the high increase in living without some relief, however. *This bill undertakes to put into force and effect by law* regu-

lations that the Government, through the Treasury Department, has already sought to establish almost to the same degree. The bill carries a little greater compensation, as I understand it, than now obtained, compensation that is absolutely needed."

* * * * *

(Page 2176)

"Mr. Tilson: It seemed to the subcommittee that, taking the regulations which have prevailed for many years, and taking the very low compensation which these men receive per day, the schedule as fixed in this bill is not more than fair for them."

(Page 2177)

"Mr. Goldfogle: Mr. Chairman, I rise to express my hearty approval of this measure. The force of customs inspectors and other customs officers covered by this bill have been and are, in my opinion, much underpaid. They render faithful and arduous service. During the winter months their work is particularly exacting and hard. They are an intelligent set of officials, and were they to turn to other avenues of employment outside Government work and do it with the same zeal, earnestness, fidelity, and efficiency as they do in the Customs Service, a private employer with due regard to his own interest would give them a large increase over what their official salaries are. They are necessarily required in wind and weather, and in storm and often amid great difficulties, to perform their service; and they have performed it well, and I am glad that at least something has been done toward helping this very deserving class of Government employees. In

the light of living conditions, the ever-increasing cost of living, the inability of these men, especially in the large cities, to get along with the meager pay they are receiving, and so that they may properly and decently provide for themselves and their families, it is but meet and proper that the Government should properly provide suitable compensation. Even this bill fails to give those men what they in justice and fairness ought to get. This however, is a step in the right direction, and I am glad to support the bill.

Mr. Pell: Mr. Chairman, no one who has ever returned to the United States can have failed to notice the courteous and efficient treatment that he has received from the customs officials. I have come through several American customhouses myself and have been impressed every time with the thoroughness, the politeness, and the sense of duty displayed by these men. Of course, there have been complaints, but my own observation is that in every case the complaint is a would-be smuggler.

These men belong to a particularly hard-used class. They must have a certain education and must keep up a certain amount of appearances. They are like all people on small, fixed incomes, being crushed between the devil and the deep sea. We should, I think, do what we can to relieve their case.

* * * * *